Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

COMMENTS OF THE PUBLIC UTILITY COMMISSION OF TEXAS ON THE PETITIONS OF SBC AND BELLSOUTH REGARDING THE FILING REQUIREMENTS OF SECTION 252

The Public Utility Commission of Texas ("Texas PUC") respectfully submits these comments to address the petitions of SBC Communications and BellSouth referenced in paragraph 13 of the Commission's *Order and Notice of Proposed Rulemaking* released August 20, 2004, in the above-captioned proceeding.[1] The petitioners ask the Commission to declare that section 252(a)(1) of the Communications Act of 1934, as amended, has a narrow scope. They argue that section 252(a)(1) should be interpreted not to require the filing of negotiated agreements between a CLEC and ILEC to provide network elements unless the ILEC has a specific duty to provide the elements under section 251(d)(2). Both petitioners identify an agreement between SBC and Sage Telecom as the reason why the Commission should issue such a declaration and preempt State commissions, even though that agreement indisputably implements SBC duties under section 251. BellSouth alternatively asks the Commission to forbear from applying section 252's filing requirements.

The Commission should deny the petitions for the reasons discussed in these comments.

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[1] In a separate filing responsive to paragraph 15 of the Notice, the Texas PUC has submitted the records of four state proceedings to assist the Commission in its reconsideration of its unbundling rules in light of *USTA v. FCC*, 359 F.3d 554 (D.C. Cir 2004) *petition for cert. filed* (June 30, 2004).

TABLE OF CONTENTS

SUMMARY

SBC's and BellSouth's petitions should be denied for two reasons. First, the petitioners have not demonstrated a compelling need for the Commission to issue a declaration regarding the scope of section 252(a)(1). Both petitions claim that the Commission must act to prevent State commissions from requiring the filing of the SBC/Sage Agreement. But that Agreement, which the Texas PUC has examined in detail, implements SBC's section 251 duties and therefore must be filed under section 252(a)(1) regardless of the declaration sought by the petitioners. The Commission has recognized that the Act places primary responsibility for enforcing section 252(a)(1) with the State commissions. The SBC/Sage Agreement provides no cause for interfering with the States' exercise of that responsibility.

Second, section 252(a)(1) does not have the restricted scope that the petitioners propose. The courts have described section 252(a)(1) to include the filing of all voluntarily negotiated agreements to provide network elements whether or not the ILEC has a specific section 251 duty to provide them. The courts' interpretation comports with the language of section 252(a)(1) which requires the filing of binding agreements voluntarily negotiated without regard to the standards in section 251 that define an ILEC's duties. That interpretation is reinforced by section 252(e)(1) which requires that "*any* interconnection agreement adopted by negotiation or arbitration shall be submitted to the State commission."

Moreover, the petitioners' policy arguments for restricting section 252(a)(1) are unpersuasive. State commission review of voluntarily negotiated agreements is limited and unintrusive. It does not present an obstacle to the negotiation of such agreements. The "give and take" of negotiations is doubly protected because other CLECs can no longer "pick and choose"

selected pieces of a filed agreement.

Finally, the Commission should not grant BellSouth's alternative petition to forbear from applying the Act's filing requirements. The Commission recently reiterated that section 252(a)(1) provides the "first and strongest protection" against discrimination under the Act. Although concerns about discrimination are less heightened when an agreement does not implement an ILEC's specific duty under section 251, it would be premature for the Commission to declare today that State commission review to check for discriminatory impact is unnecessary and superfluous.

COMMENTS

I. The petitions have a faulty predicate because agreements such as the one between SBC and Sage Telecom must be filed even under the narrow interpretation of section 252(a)(1) proposed by the petitioners.

The threshold question raised by the petitions is whether the petitioners have demonstrated a genuine need for a Commission declaration regarding the scope of section 252(a)(1). Because "the statute expressly contemplates that the section 252 filing process will occur with the states," the Commission has properly been "reluctant to interfere with their processes in this area."[2]

The centerpiece of SBC's petition is the alleged need to prevent State commissions from requiring the filing of the SBC/Sage Agreement.[3] BellSouth's follow-up petition likewise

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[2] Memorandum Opinion and Order, *In the Matter of Qwest Communications Int'l, Inc.,* WCC Docket No. 02-89, 17 FCC Rcd. 19337, 2002 WL 31204893 at *1934-42 (rel. Oct. 4, 2002).

[3] *See* SBC Emergency Petition at 2-6, 13-15, 16-19, and all five attachments to the Petition.

identifies the SBC/Sage Agreement.[4] The problem with this justification is that the SBC/Sage Agreement indisputably implements SBC's duties under section 251 and therefore must be filed even under the narrow interpretation of section 252(a)(1) sought by the petitioners. There is simply a disconnection between the declaration sought and the reason for seeking it. State commission consideration of an agreement that implements an ILEC's section 251 duties cannot possibly be a valid reason for a preemptive declaration that section 252(a)(1) requires such agreements to be filed for State commission review.

The Texas PUC has had the opportunity to examine the SBC/Sage Agreement in detail in a proceeding whose specific purpose was to determine whether the Agreement should be filed under section 252(a)(1).[5] It is undisputed that the Agreement implements at least two of SBC's section 251 duties. Under the terms of the Agreement, Sage will purchase all of its requirements for basic analog loops to provide local exchange service at a monthly lease price of $20.00.[6] The Agreement also implements SBC's section 251 duty to establish a reciprocal compensation arrangement with Sage.[7]

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[4] *See* BellSouth Emergency Petition at 10. The only other reason offered by BellSouth is a letter from a staff person at the Florida Public Service Commission saying that she "would like to know [BellSouth's] position on the issue." *Id.*

[5] *Joint CLEC Petition for a Ruling Relative to the Need for Public Review and Approval of the April 3, 2004 Telecommunications Services Agreement Between SBC Texas and Sage Telecom*, PUCT Docket No. 29644. A copy of the Agreement is included as Attachment "A" to these comments. Allegedly confidential portions have been omitted to comply with the terms of a protective order requested by Sage and SBC in *Sage Telecom and Southwestern Bell Tel. Co. d/b/a SBC Texas v. Public Util. Comm'n of Texas*, No. A 04 CA 364 SS (W.D. Tex.).

[6] *See* Agreement ¶¶ 1.1, 4.2 and "LWC Pricing Schedule" attached to the Agreement.

[7] *See id.* ¶ 16 (establishing a "bill and keep" arrangement as permitted under section 252(d)(2)(B)(i)).

In addition, the Agreement provides for Sage to lease other network elements (switching, transport, phone numbers, OS/DA, databases including LIDB and CNAM, signaling, and vertical features) that, as a package, will enable Sage to provide local exchange service as it now does in Texas using UNE-P.[8] In accordance with a Texas PUC arbitration decision currently in effect, SBC also has section 251 duties to provide Sage and other Texas CLECs with OS/DA and mass-market switching and transport.[9] The Texas PUC recognizes that the Commission may make its own findings as to whether CLECs are impaired by a lack of access to mass-market switching and transport in the rural and suburban parts of Texas served by Sage.[10] But regardless of what the Commission may determine in the future with regard to these other elements, the Agreement unquestionably implements SBC's duties to provide loops and reciprocal compensation. Therefore, the Agreement must be filed under section 252(a)(1) irrespective of the petitioners' view that section 252(a)(1) only requires the filing of agreements that implement section 251 duties.

Nor is there any question that the whole Agreement must be filed, despite SBC's suggestion that SBC and Sage should be permitted to select and file only the pieces they deem

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[8] *See id.* ¶ 4.2.

[9] *See* Revised Arbitration Award, Tex. Pub. Util. Comm'n, *Petition of MCIMetro Access Trans. Serv., et al., for Arbitration*, Docket No. 24542 (May 1, 2002), appeal pending, *Southwestern Bell Telephone, L.P. v. Public Util. Comm'n of Texas, et al.*, No. W 02 CA 374 (W.D. Tex.).

[10] The Texas PUC agrees with BellSouth that an affirmative finding of "no impairment" by the Commission under section 251(d)(2) would preclude a conflicting determination by a State commission under section 251(d)(3). The Texas PUC disagrees that the mere absence of a Commission finding would necessarily preempt a State's determination.

to be most closely related to SBC's duties.[11] The parties negotiated an agreement in which the provisions that implement SBC's section 251 duties are part of an "integrated" and "nonseverable" package in which "each and every term and condition, including pricing, of [the] Agreement is conditioned on, and in consideration for, every other term and condition."[12] Every provision is thus an essential term and condition of fulfilling SBC's duties to provide loops and reciprocal compensation.

Filing the whole Agreement also complies with the terms of the Act. Section 252(e)(2)(A) authorizes a State commission to reject the agreement "or any portion thereof" if the commission finds that the agreement "or portion thereof" discriminates against another telecommunications carrier or is otherwise not consistent with the public interest. State commissions must be able to consider an agreement as a whole in order to evaluate whether, in context, one portion is or is not genuinely discriminatory or contrary to the public interest. Had Congress envisioned the filing of only "portions of" agreements, it would have so provided. It did not. Unlike section 252(e), section 252(a)(1) requires the filing of "the agreement" in its entirety, not "portions thereof."

Finally, filing the whole Agreement comports with the Commission's "all or nothing" rule. As the Commission explained when it adopted the rule:

> all of the provisions of a particular agreement taken together should be properly viewed as legitimately related under section 252(i). In a genuine give-and-take

[11] *See* SBC Petition at 3.

[12] Agreement ¶ 5.3.

negotiation, otherwise unrelated provisions could be traded off for one another.[13] SBC describes its Agreement with Sage in exactly this way, a complete agreement that is the result of a series of trade-offs made in the course of the parties' negotiations.[14] Under the Commission's all-or-nothing rule, a CLEC can no longer "pick and choose" among provisions and therefore must have an opportunity to examine an agreement in its entirety before deciding whether to adopt the agreement in its entirety. Sections 252(a)(1), (e)(1) and (h) provide that opportunity by requiring that the complete agreement, not just selected pieces, be filed for approval and made available for public inspection and copying.

Because the SBC/Sage Agreement is the predicate for SBC's and BellSouth's petitions, the Commission should be hesitant to conclude there truly is a need to issue a declaratory ruling on the scope of section 252(a)(1) in this proceeding. As the Commission has found, "based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed" under section 252(a)(1).[15] The Texas PUC exercised its statutory role and determined that the SBC/Sage Agreement falls within section 252(a)(1).[16]

The Commission could decide for other reasons that it would be appropriate to issue a

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[13]Second Report and Order, *In the Matter of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 2004 WL 1562951 ¶ 27 (rel. July 13, 2004).

[14]*See* SBC Petition at 3, 14.

[15]*In the Matter of Qwest Communications*, 17 FCC Rcd. at *19341.

[16]Sage and SBC appealed the Texas PUC's determination. *See Sage Telecom and Southwestern Bell Tel. Co. d/b/a SBC Texas v. Public Util. Comm'n of Texas*, No. A 04 CA 364 SS (W.D. Tex.). The court is expected to render its decision shortly.

declaratory ruling on the scope of section 252(a)(1). But it should not be induced to do so by the asserted need to preempt State commission consideration of the SBC/Sage Agreement.

II. If it decides to address the issue, the Commission should conclude that sections 252(a)(1) and (e)(1) require the filing of all voluntarily negotiated agreements to provide network elements, not just agreements that implement an ILEC's specific duty under section 251.

A CLEC and ILEC have the unquestioned right to negotiate and enter into an agreement to lease network elements without regard to whether the ILEC has a section 251 duty to lease the elements. The Texas PUC, like the Commission, strongly encourages such voluntary agreements. But attaching the non-statutory label "commercial" to such agreements does not place them altogether outside the Act. The relevant statutory distinction is between arbitrated and negotiated agreements. A State commission's authority to arbitrate the specific terms of an agreement is triggered by the existence of an ILEC's duty under section 251. Negotiated agreements, on the other hand, can be entered into without regard to an ILEC's section 251 duties. Negotiated agreements cannot be arbitrated, but they still must be filed with the State commission where they are entitled to approval subject to limited review for discriminatory or other adverse public impact. Section 252(a)(1) "permits incumbent and entering carriers to negotiate private rate agreements,"[17] and "[t]he reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c)."[18] "State utility commissions are [then] required to accept any such agreement unless it discriminates

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[17] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 492 (2002).

[18] *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000).

against a carrier not a party to the contract, or is otherwise shown to be contrary to the public interest."[19]

This interpretation provides the most reasonable reading of the Act. As discussed below, it comports with the courts' description of the statutory scheme, the language of sections 252(a)(1) and (e)(1), and the Act's goals. Accordingly, if the Commission decides to address the issue, the Commission should confirm that voluntarily negotiated agreements to provide network elements, including agreements negotiated without regard to the ILEC's duty to provide the elements, should be filed for limited State commission review under section 252.

A. Courts, including the Supreme Court, have described the scope of section 252(a)(1) to include the filing of all voluntarily negotiated agreements to provide network elements irrespective of whether the ILEC has a section 251 duty to provide them.

SBC and BellSouth argue that section 252(a)(1) is limited to negotiated agreements that implement an ILEC's duties under section 251. The courts have read section 252(a)(1) exactly the other way. In *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court described agreements subject to section 252(a)(1) as follows:

> When an entrant seeks access [to an incumbent's network], the incumbent can negotiate an agreement *without regard to the duties it would otherwise have under § 251(b) or § 251(c)*. See § 252(a)(1).[20]

And in *Verizon Communications v. FCC*, the Court observed that

> State utility commissions are required to accept any such [negotiated] agreement unless it discriminates against a carrier not a party to the contract, or is otherwise

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[19] *Verizon*, 535 U.S. at 492.

[20] 525 U.S. at 372-73 (emphasis added).

shown to be contrary to the public interest.[21]

In *CoServ Ltd. Liability Corp. v. Southwestern Bell Tel. Co.*, the Fifth Circuit made the same observation:

> Under the provision for voluntary negotiations [§ 252(a)(1)], the parties are free to reach any agreement, *without* regard to the duties set forth in § 251. However, any voluntary agreement must be submitted to the state commission for approval.[22]

The courts' description of section 252(a)(1) is unsurprising and should be adopted by the Commission because it fits comfortably with the language of the statute.

B. The language of sections 252(a)(1) and (e)(1) supports the courts' interpretation that the filing requirement for voluntarily negotiated agreements does not depend on whether the agreement implements section 251 duties.

To support their interpretation, SBC and BellSouth rely almost entirely on the opening phrase in the first sentence of section 252(a)(1), which states: "Upon receiving a request for interconnection, services or network elements pursuant to section 251," the ILEC may negotiate an agreement with the requesting CLEC. The petitioners argue that "pursuant to section 251" implicitly means the ILEC must have a specific section 251 duty to provide the network elements in question. But by separating this phrase from the balance of the sentence and from the section as a whole, the petitioners distort the natural import of the provision.

Section 252(a)(1) provides in full:

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[21] *Verizon*, 535 U.S. at 492.

[22] 350 F.3d 482, 485 (5th Cir. 2003) (emphasis in original).

> (a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATION
>
> (1) VOLUNTARY NEGOTIATIONS.—Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including an interconnection agreement negotiated before [the date of enactment of the 1996 Act], shall be submitted to the State commission under subsection (e) of this section.

The natural reading and common-sense thrust of the first sentence is to permit an ILEC and CLEC to work out an agreement on their own that provides the CLEC with network elements, interconnection, or services without regard to whether the ILEC must provide them under section 251. An ILEC and CLEC may "negotiate and enter into a binding agreement" to provide network elements, interconnection, or services "without regard to the standards set forth in subsections (b) and (c) of section 251." Those agreements "shall be submitted to the State commission under subsection (e)." Subsection (e) itself independently and unequivocally provides: "*Any* interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." (Emphasis added.)

SBC and BellSouth urge that a distinction be drawn between the "standards" in section 251 and an ILEC's "duties" under section 251. That is not a valid distinction because among the standards in section 251 are those that define whether the incumbent has a duty to provide the elements. An ILEC's duty to provide unbundled access to a network element depends on the "Access *Standards*" in subsection 251(d)(2), including the "impairment" standard. The Commission can and has applied the impairment standard to make affirmative determinations that an incumbent has no duty to provide particular elements. Section 252(a)(1) provides that

the incumbent may voluntarily choose to negotiate an agreement to lease the elements anyway — *i.e.*, "without regard to the standards" in section 251.

It is true that the impairment standard appears in subsection 251(d) while section 252(a)(1) refers to subsections 251(b) and (c). But subsection (c) incorporates subsection (d) by making it an ILEC's duty to provide unbundled access to network elements "in accordance with . . . the requirements *of this section [251]* and section 252." A contrary interpretation would prevent an ILEC and CLEC from negotiating an agreement "without regard to" the TELRIC pricing standard because that standard also originates outside of subsections 251(b) and (c).

SBC and BellSouth additionally argue that section 252(a)(1) should be limited by section 251(c)(1). Section 251(c)(1) makes it an ILEC's "duty to negotiate in good faith . . . the particular terms and conditions of agreements to fulfill the [incumbent's] duties" in sections 251(b) and (c). But section 252(a)(1) is more inclusive. By its very title, section 252(a)(1) contemplates "*voluntary* negotiations," not just section 251(c)(1) "duty negotiations," and the result of those voluntary negotiations can be "agreements without regard to" sections 251(b) and (c). Thus, a CLEC's request "pursuant to section 251" asks the ILEC to negotiate an agreement to provide section 251 items such as network elements, interconnection, or services. If the ILEC has a duty to provide the requested item, then section 251(c)(1) directs that the ILEC must negotiate in good faith to reach an agreement. If the ILEC has no duty to provide the requested item, it may decline to negotiate — or, it may *voluntarily* negotiate without regard to its section 251 obligations. Any voluntarily negotiated agreement must then be filed as prescribed by section 252(a)(1).

The last sentence in section 252(a)(1) also confirms that the scope of the section's filing requirement is not limited to agreements that implement an ILEC's section 251 duties. The last sentence requires the filing of all negotiated agreements including those "negotiated *before* the date of enactment of the [1996 Act]." An ILEC obviously had no section 251 duties prior to the 1996 Act, yet Congress expressly determined that such agreements, along with all other voluntary negotiated agreements to provide network elements, must be filed under section 252(a)(1).

It is not impossible to read section 252(a)(1) restrictively as the petitioners urge, but the far stronger reading is the one reflected in the Supreme Court opinions in *Iowa Utilities Board* and *Verizon* and the Fifth Circuit opinion in *CoServ* set out above.

C. SBC's and BellSouth's policy arguments do not support limiting the scope of section 252's filing requirement.

The petitioners' policy arguments for restricting the scope of section 252(a)(1) are heavy on rhetoric and light on substance. The petitioners principally raise "the prospect of intrusive regulation."[23] They suggest that "State commissions might insist that the parties change the terms of the agreements as a precondition to their approval."[24] In the petitioners' view, "Section 252, therefore, poses a risk that states can trump market-based negotiations."[25]

These concerns are speculative and unfounded. State commission review of voluntarily negotiated agreements under the Act is limited. It is not the State commission's role to second-

[23]SBC Petition at 15.

[24]*Id.* at 13.

[25]BellSouth Petition at 2.

guess the parties and impose specific rates or other terms, as may occur in the case of arbitrated agreements. "State utility commissions are required to accept any [negotiated] agreement unless it discriminates against a carrier not a party to the contract, or is otherwise shown to be contrary to the public interest."[26] Since the 1996 amendments to the Act took effect, the Texas PUC has reviewed and approved hundreds of voluntarily negotiated agreements and amendments under section 252. Rejection has been an extremely rare occurrence. The Texas PUC's goal is the Act's goal — to encourage and facilitate, not stifle, negotiations.

SBC and BellSouth also raise the policy concern that having to file negotiated agreements would chill the "give and take" of negotiations because the parties would know that other CLECs can "pick and choose" to adopt selected parts of such agreements under section 252(i).[27] This concern predates and is answered directly by the Commission's all-or-nothing rule. An ILEC and CLEC can now negotiate freely without running the risk of selective adoption by others. SBC and BellSouth recently advised the Commission that they supported the all-or-nothing rule precisely because it "allow[s] them finally to engage in meaningful negotiations — with all the give-and-take that such negotiations entail — free from the danger that isolated 'gives' would be obtained by other parties without the accompanying 'takes'."[28] The Commission agreed and adopted the new rule to "restore incentives to engage in give-and-take negotiations *while*

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[26] *Verizon*, 535 U.S. at 492; *see* Act § 252(e)(1), (e)(2)(A).

[27] *See* SBC Petition at 14; BellSouth Petition at 13.

[28] Opposition of the United States Telecom Ass'n, SBC Communications Inc., The Verizon Telephone Companies, BellSouth Corp., and Qwest Communications Int'l, Inc. to Join Emergency Petition for Stay of Order, CC Docket No.01-338 (Aug. 11, 2004).

maintaining effective safeguards against discrimination."[29] The Commission expected State commissions to provide that discrimination check through the section 252 filing and approval process.[30]

SBC's petition expresses concern that filing agreements under section 252(a)(1) could unnecessarily reveal confidential business plans. SBC quotes a statement by a Sage official that the SBC/Sage Agreement contains such confidential information.[31] But Sage maintains that the allegedly confidential provisions of the Agreement do not concern the provision of network elements.[32] Separately negotiated agreements that do not involve the provision of network elements, interconnection, or services fall outside section 252(a)(1) and need not be filed. Only when parties choose to include what might otherwise be confidential information as a term and condition of providing network elements in an agreement must the information be filed under section 252(a)(1). As Sage acknowledged in federal court,"section 252 eliminates the ability maintain trade secrets" for agreements that are subject to the Act.[33] Even BellSouth agrees that all negotiated agreements should be publicly filed pursuant to section 211 of the Act.[34]

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[29]Second Report and Order at ¶ 11, CC Docket No. 01-338 (rel. July 13, 2004)(emphasis added).

[30]*Id.* at ¶ 29.

[31]SBC Petition at 13.

[32]*See Sage Telecom and Southwestern Bell Tel. v. Public Util. Comm'n of Texas*, No. A-04-CA-364 (W.D. Tex.) (Plaintiff's Application for Injunctive Relief, Motion for Summary Judgment and Brief in Support at 11).

[33]*Id.* at 26.

[34]*See* BellSouth Petition at 9. BellSouth proposes section 211 as an alternative to section 252(a)(1), but there is no necessary incompatibility between filing agreements under both provisions.

Finally, relying once more on the SBC/Sage Agreement, the petitioners argue that the scope of section 252(a)(1) should be narrowed in order to prevent a State commission from thwarting implementation of a region-wide agreement because of state-specific concerns.[35] At least with regard to the SBC/Sage Agreement, however, the parties readily implemented the Agreement in other states while delaying implementation to litigate the issue in Texas. More importantly, the petitioners' argument contradicts the dual-jurisdictional structure of the Act. Congress made the judgment that, regional or not, negotiated agreements between a CLEC and ILEC must be filed with the State commissions. That legislative judgment rests on the eminently reasonable conclusion that State commissions are best positioned to check to make sure that an agreement does not have a discriminatory or other adverse public impact in specific markets.

Section 252(a)(1) requires the filing of all negotiated agreements to provide network elements because it ensures that incumbents treat competitors with whom they do business evenhandedly. As the Commission recently emphasized, "Compliance with section 252(a)(1) is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors."[36] Filing negotiated agreements to provide network elements whether or not they implement specific section 251 duties serves that important statutory objective. At the same time, State commission review of voluntarily negotiated agreements is limited. Especially with the Commission's all-or-nothing rule in place, State commission review should pose no impediment to negotiation or implementation of such agreements.

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[35] *See* SBC Petition at 13; BellSouth Petition at 8.

[36] *Notice of Apparent Liability Forfeiture, In the Matter of Qwest Corp.*, 19 FCC Rcd. 5169, 2004 WL 486232 ¶ 46 (rel. Mar. 12, 2004).

III. The Commission should not preempt State commissions or forbear from applying the Act's filing requirement.

BellSouth argues that sections 251(d)(2) and (d)(3) authorize the Commission to preempt State commissions from requiring agreements to be filed under section 252(a)(1).[37] That is incorrect. Those sections authorize the Commission to preempt a State from imposing additional unbundling obligations if they are inconsistent with or substantially prevent implementation of section 251 and the purposes of sections 251-261. Requiring an agreement to be filed under section 252(a)(1) is not the same as imposing an additional obligation to unbundle network elements under section 251(d)(3). Sections 251(d)(2) and (d)(3) authorize preemption of the latter, not the former.

In any event, preemption is unwarranted because the Texas PUC has not taken action under state law that thwarts the Act's or the Commission's goals. The Texas PUC did not even act under state law but under sections 252(a)(1) and (e)(1) when it determined that the SBC/Sage Agreement should be filed. As discussed above, that determination accords with the statutory language and promotes the Act's goal of non-discrimination without the impediments of regulatory second-guessing or CLEC picking-and-choosing that might chill negotiations.

For similar reasons, the Commission should deny BellSouth's petition for forbearance.[38] As noted above, the Commission concluded only earlier this year that compliance with section 252(a)(1) is the "first and strongest protection" against discrimination under the Act. Concerns

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[37] BellSouth Petition at 11.

[38] BellSouth states that it filed this second petition in the event the Commission or a reviewing court disagrees with BellSouth's restrictive interpretation of section 252(a)(1). *See* BellSouth Petition for Forbearance at 2.

about possible discrimination or other adverse public impact are undoubtedly reduced when a negotiated agreement involves network elements that an ILEC does not have a specific duty to provide under section 251. But the extent of an ILEC's duties remains to be fully settled, and the competitive impact of all such agreements in specific markets cannot be dismissed across-the-board. It would therefore be premature to conclude that State commission review to check for discriminatory impact is unnecessary and superfluous. That day may come, but its prospect does not justify abandoning the Act's requirements now.

IV. Conclusion

For the foregoing reasons, the petitions of SBC Communications and BellSouth should be denied.

Respectfully submitted,

THE PUBLIC UTILITY COMMISSION OF TEXAS

Greg Abbott
Attorney General of Texas

Edward D. Burbach
Deputy Attorney General for Litigation

Karen W. Kornell
Chief, Natural Resources Division

/original signed/

Steven Baron
Assistant Attorney General
Natural Resources Division
P. O. Box 12548
Austin, Texas 78711-2548
Tel: (512) 475-4151
Fax: (512) 320-0911

Its Attorneys